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Supreme Court of the United States.

No.

76-1855

SPENCER PRESS, INC.,

APPELLANT,

v.

DONALD ALEXANDER, COMMISSIONER OF INTERNAL REVENUE FOR THE UNITED STATES,

APPELLEE.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MASSACHUSETTS.

Statement of Jurisdiction.

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Statement of Jurisdiction.

The appellant appeals from the final Order dismissing its Complaint of a Three-Judge Court of the United States District Court for the District of Massachusetts, entered on February 28, 1977, which Complaint requested an interlocutory, preliminary and permanent injunction. The appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial questions are presented.

Opinion Below.

The memorandum and Order of the Three-Judge Court of the United States District Court for the District of Massachusetts is unreported and is reproduced in Appendix B. The opinion of the Court of Appeals for the First Circuit is reported as *Spencer Press* v. *Alexander,* 491 F. 2d 589 (1st Cir. 1974), and is reproduced in Appendix B.

Jurisdiction.

This suit was brought by the appellant (plaintiff below) to enjoin the enforcement of a statutory scheme of tax statutes as unconstitutional. The appellant appeals from the final Order dismissing its Complaint, of a Three-Judge Court of the United States District Court of the District of Massachusetts, entered on February 28, 1977, which Complaint requested an interlocutory, preliminary and permanent injunction. Notice of appeal was filed on April 27, 1977, in the United States District Court for the District of Massachusetts. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253, which is reproduced in Appendix B. The following cases and decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Clark* v. *Poor,* 274 U.S. 554 (1927); *Interstate Busses Corp.* v. *Blodgett,* 276 U.S. 245 (1928); *Van Dyke* v. *Geary,* 244 U.S. 39 (1917); *Coleman* v. *Miller,* 307 U.S. 433 (1939).

Constitutional and Statutory Provisions Involved.

This case involves the Fifth Amendment to the Constitution of the United States, and the following statutory

provisions: 26 U.S.C. § 6212, 26 U.S.C. § 6213, 26 U.S.C. § 6321, 26 U.S.C. § 6213(a) and (b), 26 U.S.C. § 6659 and 26 U.S.C. § 7421. The statutory provisions are reproduced in Appendix A, and the Fifth Amendment to the Constitution of the United States is set forth below:

United States Constitution.
Amendment V.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Question Presented.

The following question is presented by this appeal:

Whether the statutory scheme of 26 U.S.C. §§ 6212, 6213, 6321, 6331(a) and (b), 6659 and 7421, which allows the Internal Revenue Service to assess a penalty against a taxpayer, and to deprive a taxpayer of an opportunity to contest, prior to payment, the penalty assertedly due to the Internal Revenue Service, and which authorizes or directs seizure of the taxpayer's property without affording him any opportunity for a prior hearing, is in violation of the Due Process Clause of the Fifth Amendment

to the Constitution of the United States, and therefore, unconstitutional.

Statement of the Case.

Relevant Facts and Proceedings Below.

The statement of facts contained in the United States Court of Appeals for the First Circuit Decision, contained in Appendix B are adopted.

The appellee has imposed a penalty in the amount of Twenty-Nine Thousand, Six Hundred, Thirty-Six and 98/100 Dollars ($29,636.98), against the appellant, as the result of a late filing by the appellant of the corporate income tax returns of the years 1969 and 1970.

In 1963, in the exercise of ordinary business care and prudence, the appellant selected and hired a former officer of the Internal Revenue Service to act as tax accountant, and turned over to him the task of preparing and filing the appellant's tax returns, as the appellant was not familiar with tax law. The appellant made full disclosure of all relative facts to the accountant, with which the accountant would prepare the tax return. The appellant was surprised to be notified by the Internal Revenue Service, after the appellant believed that his tax returns were being handled in due course, that no corporate income tax returns had been filed for the tax years 1967 through 1970.

Upon questioning the accountant, the appellant learned that the accountant had not filed the corporate income tax returns due to nothing more than the fraud and misrepresentation by the accountant that they had been filed. The appellant promptly hired a new accountant, reconstructed its records, and filed returns for those years, paying in full all the tax and interest due. The appellee claimed the statutory penalty for late filing of the returns, whereupon the appellant filed with the appellee an affidavit of the facts surrounding the late filings and requested a waiver of the penalty.

The appellant was notified by the appellee that he had denied the right of the appellant to a waiver of the penalty and that it was the intention of the appellee to place liens on the appellant's real and personal property.

The appellant then brought an action in the United States District Court for the District of Massachusetts, to restrain the collection of the penalty by the appellee for the late filing of said corporate income tax returns, and to have a determination of whether or not the penalty is due the appellee. The District Court denied the appellant's request for a preliminary injunction, wherefore, the appellant filed an appeal to the United States Court of Appeals for the First Circuit, seeking such a preliminary injunction.

On February 5, 1974, the United States Court of Appeals remanded the case to the District Court with the order to convene a Three-Judge Court upon the filing of an amending complaint by the appellant. Subsequently, the appellant filed an amended complaint raising the constitutional question presented, in compliance with the order of the United States Court of Appeals, requesting the convening of the Three-Judge Court. On February 3, 1977, a hearing was held before the Three-Judge Court, and on February 28, 1977, the Three-Judge Court filed its memorandum and Order dismissing the Complaint of the appellant.

The Questions Presented Are Substantial.

This appeal asks the Court to review the statutory scheme whereby the Internal Revenue Service may assess a penalty

against a taxpayer, deprive a taxpayer of an opportunity to contest, prior to payment, the penalty assertedly due the Internal Revenue Service, and seize the taxpayer's property without affording him an opportunity for a prior hearing. The Court is requested to determine that this statutory scheme is in violation of the Due Process Clause of the Fifth Amendment of the Constitution of the United States and therefore, is unconstitutional.

As noted above, upon discovery of the fraud and misrepresentation of the appellant's accountant, the appellant took all the necessary steps to prepare and file at great expense all the tax returns which had not been filed, and paid all the tax and interest due thereon. Notwithstanding the fact that the appellant presented all the facts surrounding these tax returns to the appellee, the appellee imposed a penalty in the form of a punishment in the face of the facts which established as a matter of law that the appellant was entitled to a waiver of the penalty as requested by the appellant, which request for waiver the appellee denied summarily. The appellant maintains that as a matter of law it has the right to a waiver of the penalty imposed by the appellee. *Fisk* v. *C.I.R.*, 203 F. 2d 358 (6th Cir. 1953); *Geisen* v. *United States*, 369 F. Supp. 33 (W.D. Wisc. 1973).

Notwithstanding this status of the law, the Court below has determined that this action was barred by the so-called Anti-Injunction Statute, 26 U.S.C. § 7421, because the penalty which was assessed against the appellant, is not a penalty or punishment, but is a tax, under 26 U.S.C. § 6659. Thus, the Court below rationalized that the allowance of injunctive relief to the taxpayer would totally frustrate the objectives of the Anti-Injunction Statute which are the furtherance of efficient and expeditious collection of taxes with a minimum of pre-enforcement judicial inter-

ference. This logic, coupled with the prohibition of 26 U.S.C. § 6659 that additions to tax, such as the penalty in this case, are not deficiencies for which a 90-day notice is required, which notice would entitle the taxpayer to a proper judicial determination of its liability before a deprivation of property wthout due process, broadens the statutory scheme to further preclude the appellant from the availability of due process.

There is serious question as to whether or not the penalty which was imposed by the appellee, can be considered as a mere addition to taxes. In the case of *Burke* v. *Mingori*, 128 F. 2d 996 (10th Cir. 1942), the Court in construing 26 U.S.C. § 7421 (then § 3653 "Internal Revenue Code of 1939"), indicated that this section forbidding the issuance of an injunction to restrain the collection of taxes does not prevent the granting of injunctive relief where an assessment in the form of a tax is in reality a penalty in the nature of a punishment. In *Lipke* v. *Lederer*, 259 U.S. 557, 562 (1922), the Court indicated that the primary function of tax is to provide for the support of the government while the definite function of a penalty is punishment for infraction of law.

The penalty assessed by the appellee in this case takes on an even clearer picture of being punishment rather than a tax to support the government, when the further statutory scheme represented by the various statutes cited herein is examined. Under 26 U.S.C. §§ 6212 and 6213, if the appellant had contested the tax imposed by the Internal Revenue Service, the appellant would be entitled to a prior judicial hearing even though that tax may have added thereto interest and penalties, but if the appellant admits to and pays the tax and interest but not the penalty, a punishment is then imposed upon the appellant and the appellant has no right or privilege to have a prior judicial hearing before

his property is levied upon and seized by the appellee under 26 U.S.C. § 6321 and 26 U.S.C. § 6331(a) and (b). The operation of these statutes deprives the appellant of the right to contest, by appropriate judicial hearing, the assessment of the penalty and the levy and seizure of its property, which deprivation violates the Due Process Clause of the Fifth Amendment of the Constitution of the United States, and therefore, is unconstitutional. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Schneider* v. *Margossian*, 349 F. Supp. 741 (D. Mass. 1972).

This further shows the infirmity of the Court's decision below, because it is impossible to maintain the proposition that a penalty such as this one can be considered as those taxes with which it is necessary for our government to function. If that be the case, then the government is operating on the theory that a certain percentage of taxpayers in any given year will transgress the tax laws and the Internal Revenue Service can run out and assess penalties and levy and seize the taxpayers' property to pay government obligations without a judicial hearing to slow them down for the time being. Thus, following this theory, if every taxpayer filed his tax return on time and paid all his taxes, etc., in any given year, then our government would go bankrupt for lack of penalty money.

A further examination of the operation of the statutes in question here reveals the never-ending circular maze within which the appellant has been placed by its rightful contesting of the penalty imposed by the appellee in a situation where the appellant is entitled to a waiver of the penalty as a matter of law. Under 26 U.S.C. § 7421, the so-called Anti-Injunction Statute, "Except as provided in sections 6212(a) and (c), 6213(a) and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by

any person . . . ." The thrust of this section is that if the assessment against the taxpayer is in the form of a tax, then the taxpayer is precluded from contesting the tax assessed prior to the time of payment of the assessment. Up until May of 1960, the penalty assessed against the appellant in this case, would not have been within the purview of § 7421, because up to that point in time, the penalty assessed was not considered a tax under 26 U.S.C. § 6659. As such, the penalty could be the subject of a prior judicial hearing before the payment of the penalty by the appellant. However, because of the confirmation of this right of the appellant prior to that date, as evidenced by the cases of *Granquist* v. *Hackleman*, 264 F. 2d 9 (9th Cir. 1959), and *Strawberry Hill Press, Inc.* v. *Scanlon*, 273 F. 2d 306 (2d Cir. 1959), a change was made in § 6659 to include a penalty, such as has been assessed against the appellant, as a tax for treatment in the other statutes. The ramification of this, however, was to legislatively cut off the appellant's right of due process as secured by the Fifth Amendment to the Constitution, and force the appellant into a situation whereby the appellant would be bankrupt by the payment of the large penalty assessed by the appellee, to a point where the appellant would not have the resources to even attempt a refund action, even though the appellant, as a matter of law, is not liable to the appellee for the penalty assessed against it.

The unconstitutionality of this statutory scheme as set forth above, not only irreparably harms the appellant, but in actuality harms thousands, maybe even millions, of other taxpayers similarly situated across the country, and this question, which has never been decided before by this Court, is of such a substantial nature that its resolution is necessary.

Matters of Abuse of Discretion.

The matters in which the Court has abused its discretion are that the dismissal of the appellant's complaint by the Court below, and thus the denial of the interlocutory injunction requested by the appellant in its complaint, were an abuse of discretion wherein the appellant had demonstrated not only the unconstitutionality of the statutory scheme which was the basis of this action, but had also shown the irreparable harm which would be suffered by the appellant, as well as the absolute right of the appellant, under the facts of the action, to a waiver of the penalty which the appellant was being effectively denied the right to a prior judicial hearing upon.

The Court below also abused its discretion by dismissing the appellant's complaint and denying the injunction requested therein, based upon the determination that the action is barred by the Anti-Injunction Statute, without a full and complete determination of the serious constitutional questions raised by the appellant's complaint.

Respectfully submitted,

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Appendix A.

26 U.S.C. § 6212.

6212. Notice of Deficiency. [Sec. 1906(b)(13)(A) of P. L. 94-455, 90 Stat. 1834, amended this section by deleting "or his delegate" each place it appears therein.]

(a) In general.—

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for notice of deficiency.—

(1) Income and gift taxes and taxes imposed by chapter 41, [sic] chapter 42. In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint Income Tax Return.—In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by registered mail to each spouse at his last known address.

(3) Estate Tax.—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fi-

duciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11 [§§ 2001-2207 of this title], if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 [§§ 2001-2207 of this title] and of this chapter [§§ 6201-6216 of this title].

(c) Further deficiency letters restricted.—

(1) General rule. If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 for the same taxable year, of chapter 43 for the same taxable years, of chapter 44 for the same taxable years, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross References.—For assessment as a deficiency notwithstanding the prohibition of further deficiency letters in the case of—

(A) Deficiency attributable to change of election to take standard deduction where taxpayer and his spouse made separate returns, see section 144 (b).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033 (a) (3) (C) and (D).

(C) Deficiency attributable to gain on sale or exchange of personal residence, see section 1034 (j).

(D) [Repealed]

(E) [Sic] Deficiency attributable to activities not engaged in for profit, see section 183(e)(4). (As amended Dec. 30, 1969, P. L. 91-172, Title I, § 101(f)(2), (j) (40), (41), 83 Stat. 524, 530, Dec. 31, 1970, P. L. 91-614, Title I, § 102(d)(5), 84 Stat. 1842; Sept. 2, 1974, P. L. 93-406, Title II, Subtitle A, Part 1, § 1016(a)(10), 88 Stat. 930; Oct. 4, 1976, P. L. 94-455, Title II, § 214(b), 90 Stat. 1549, Title XII, §§ 1204(c)(5), 1206(c)(3), 90 Stat. 1698, 1704, Title XIII, § 1307(d)(2)(F)(ii), (d)(2)(G), 90 Stat. 1727, Title XVI, § 1605(b)(5), 90 Stat. 1754, Title XIX, Subtitle A, §§ 1901(b)(31)(C), (b)(37)(C), 1906(b)(13)(A), 90 Stat. 1800, 1803, 1834.

6213. Restrictions Applicable to Deficiencies—Petition to Tax Court. [Sec. 1906(b)(13)(A) of P. L. 94-455, 90 Stat. 1834, amended this section by deleting "or his delegate" each place it appears therein.]

(a) Time for filing petition and restriction on assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the

Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) Exceptions to restriction on assessment.—

(1) Assessments arising out of mathematical or clerical errors. If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors—

(A) Request for abatement. Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 30 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection. In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

(3) [Former (2) redesignated as (3)]

(3) Assessments arising out of tentative carryback adjustments. If the Secretary determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the excess as a deficiency as if it were due to a mathematical or clerical error appearing on the return.

(4) Assessment of Amount Paid.—Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

(c) Failure to file petition.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

(d) Waiver of restrictions.—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right by a signed notice in writing filed with the Secretary or his delegate, to waive the restriction provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

(e) Suspension of filing period for certain excise taxes. The running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to investments which jeopardize charitable purpose), 4945 (relating to taxes on taxable expenditures), 4971 (relating to excise taxes on failure to meet minimum funding standard), 4975 (relating to excise taxes on prohibited transactions) shall be suspended for any period during which the Secretary or his delegate has extended the time allowed for making correction under section 4941(e)(4), 4942(j)(2), 4943(d)(3), 4944(e)(3),, [sic] 4945(i)(2), 4971(c)(3), or 4975(f)(4), [sic].

(f) Definitions. For purposes of this section—

(1) Return. The term "return" includes any return, statement, schedule, or list, and any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 42 or 43.

(2) Mathematical or clerical error. The term "mathematical or clerical error" means—

(A) an error in addition, subtraction, multiplication, or division shown on any return,

(B) an incorrect use of any table provided by the Internal Revenue Service with respect to any return if such incorrect use is apparent from the existence of other information on the return,

(C) an entry on a return of an item which is inconsistent with another entry of the same or another item on such return,

(D) an omission of information which is required to be supplied on the return to substantiate an entry on the return, and

(E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, or chapter 42 or 43, if such limit is expressed—

(i) as a specified monetary amount, or

(ii) as a percentage, ratio, or fraction,

and if the items entering into the application of such limit appear on such return.

(g) [Former (f) redesignated as (g)] (As amended Dec. 30, 1969, P. L. 91-172, Title I, § 101(f)(3), (j) (42), 83 Stat. 524, 530; Sept. 2, 1974, P. L. 93-406, Title II, Subtitle A, Part 1, § 1016(a)(11), 88 Stat 930; Oct. 4, 1976, P. L. 94-455, Title XII, §§ 1204(c)(6), 120(a), (b), (c)(1), 90 Stat. 1698, 1703, 1703, 1703, 1704, Title XII, § 1307(d)(2)(F)(iii), 90 Stat. 1728, Title XVI, § 1605(b)(6), 90 Stat. 1755, Title XIX, Subtitle A, § 1906(a)(15), (b)(13)(A), 90 Stat. 1825, 1834.)

26 U.S.C. § 6321.

6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (Aug. 16, 1954, c. 736, 68A Stat. 779).

26 U.S.C. § 6331.

6331. Levy and Distraint.

(a) Authority of secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall

be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter [§§ 6301-6344 of this title] for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.—The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (d)(3), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

26 U.S.C. § 6659.

6659. Applicable Rules.

(a) Additions treated as tax.—Except as otherwise provided in this title—

(1) The additions to the tax, additional amounts, and penalties provided by this chapter [§§ 6651-6674 of this title] shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter [§§ 6651-6674 of this title].

(b) Additions to tax for failure to file return or pay tax.—Any addition under section 6651 or section 6653 to a tax imposed by another subtitle of this title shall be considered a part of such tax for the purpose of applying the provisions of this title relating to the assessment and collection of such tax (including the provisions of subchapter B of chapter 63 [§§ 6211-6216 of this title], relating to deficiency procedures for income, estate, and gift taxes). (Aug. 16, 1954, c. 736, 68A Stat. 827.)

26 U.S.C. § 7421.

SUBCHAPTER B—PROCEEDINGS BY TAXPAYERS

7421. Prohibition of Suits to Restrain Assessment or Collection.

(a) Tax.—

Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.—No suit shall be maintained in any court for the purpose of restraining

the assessment or collection (pursuant to the provisions of chapter 71 [§§ 6901-6904 of this title]) of—(As amended Oct. 4, 1976, P. L. 94-455, Title XII, § 1204(c)(11), 90 Stat. 1699.)

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) [31 § 192] in respect of any such tax. (Aug. 16, 1954, c. 736, 68A Stat. 876.)

28 U.S.C. § 1253.

1253. Direct appeals from decisions of three-judge courts.—Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. (June 25, 1948, c. 646, § 1, 62 Stat. 928.)

Appendix B.

United States Court of Appeals for the First Circuit

No. 73-1399

SPENCER PRESS, INC.,
PLAINTIFF, APPELLANT,
v.
DONALD ALEXANDER, ETC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Robert B. Smith, with whom *Galvin, Smith & Nordlinger* were on brief, for appellant.

Daniel F. Ross, Attorney, Tax Division, Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *James N. Gabriel*, United States Attorney, *William Brown*, Assistant United States Attorney, *Meyer Rothwacks*, and *Crombie J. D. Garrett*, Attorneys, Tax Division, Department of Justice, were on brief, for appellee.

February 5, 1974

CAMPBELL, *Circuit Judge*. Appellant Spencer Press, Inc. (Spencer) brought an action against the Commissioner of Internal Revenue, seeking a preliminary injunction to prohibit the Commissioner from collecting an "addition to tax" provided by the Internal Revenue Code of 1954, 26 U.S.C. § 6651, for late filing of an income tax re-

turn. Spencer requested the district court to determine that, on the merits, no addition to tax was owed; alternatively it requested the court to order the Commissioner to issue a notice of deficiency (90 day notice) so that Spencer would have an opportunity to present the matter to the Tax Court prior to collection of the tax. 26 U.S.C. §§ 6212, 6213.

The district court, on December 7, 1973, dismissed the complaint "with leave to file a complaint with proper jurisdictional allegation, within 30 days." An amended complaint was filed on December 10, 1973, and was dismissed without hearing by the district court on December 11 "in view of the fact that this Court after a hearing on December 7, 1973 denied an application for a preliminary injunction based on the same allegations of fact . . ."

Spencer immediately appealed and requested an injunction pending appeal. Because the Internal Revenue Service proposed to levy on Spencer's property on December 21, we issued an injunction pending appeal and restrained the collection of the tax until the appeal had been determined. The case was advanced on the docket and oral argument heard on January 10, 1974.

The appeal like the original petition actually raises two issues or groups of issues. The first pertain to whether or not under existing statutes plaintiff is entitled to a pre-levy judicial determination of his liability for the additional tax. We conclude, as did apparently the district court, that he is not. The second pertain to whether, under expanded concepts of due process, *see Fuentes* v. *Shevin*, 407 U.S. 67 (1972), a statutory scheme which authorizes or directs seizure of plaintiff's property without affording any opportunity for a prior hearing is constitutional. As to this issue, neither a single-judge district court nor ourselves have jurisdiction. 28 U.S.C. § 2282. We accordingly

affirm the order of the district court insofar as it was based upon its interpretation of the statutes of the United States, *cf. Rosado* v. *Wyman*, 397 U.S. 397 (1970), but remand to the district court with instructions to request the convening of a three-judge district court should the plaintiff within ten days file an amended complaint requesting such a court and framing appropriate constitutional issues.

According to Spencer's complaint its difficulties began when, in 1963, it hired a former officer of the Internal Revenue Service to act as its tax accountant, and turned over to him the task of preparing and filing tax returns. Although everything was apparently being handled in due course, Spencer says it was rudely surprised when the Internal Revenue Service informed it that no returns had been filed for the tax years 1967 through 1970. Spencer asserts that it promptly hired a new accountant, reconstructed its records, and filed returns for those years, paying in full all of the tax and interest due. The IRS is apparently satisfied that the taxes have been paid in full.

The IRS has claimed the statutory penalty for late filing of returns. Spencer resisted the claimed "addition to tax", believing that case law supported its position that a taxpayer acting in good faith and with reasonable care is not liable for an addition to tax when defrauded by its accountant. *See, e.g., Fisk* v. *CIR*, 203 F.2d 358 (6th Cir. 1953); *Geisen* v. *United States*, —— F. Supp. ——, 73-2 U.S. Tax Cases ¶ 12,950 (W.D. Wisc. 1973). Spencer wrote the IRS to request a waiver of the addition to tax, but the Service announced its intention to levy on Spencer's property unless Spencer paid the tax allegedly due.

Spencer then filed the instant suit, requesting that the Commissioner be enjoined from collecting the tax until

Spencer has had an opportunity for hearing on its claims that it should be excused. The complaint further contends, perhaps anticipating the Commissioner's defense, that any actions taken to collect the tax without such a hearing would be in violation of due process. *See Fuentes* v. *Shevin, supra.*

The Commissioner responded by drawing attention to 26 U.S.C. § 7421, which precludes district courts from enjoining the collection of a "tax".[1] He then argued that, although there is an exception to § 7421 for cases in which the IRS was required to, but did not, issue a 90 day notice, no such notice was required. The Commissioner relied upon § 6659, which provides that additions to tax such as the one in this case are not the "deficiencies" for which a 90 day notice is required.[2] We agree with the Commissioner's interpretation. Appellant's reliance upon cases decided prior to the change in § 6659 effected in 1960 by P.L. 86-470, 74 Stat. 132, is entirely misplaced.[3]

What is left therefore is the question of the constitutionality of §§ 6659, 6213, 6212, and 7421 to the extent that

[1] The constitutionality or applicability of § 7421 in another context is now before the Supreme Court. *Walters* v. *"Americans United", Inc.*, 477 F.2d 1169 (D.C. Cir.), *cert. granted* 412 U.S. 927 (1973); *Bob Jones University* v. *Connally*, 472 F.2d 903 (4th Cir.), *cert. granted* 42 U.S.L.W. 3175 (Oct. 9, 1973). *Cf. Commonwealth Development Ass'n* v. *United States*, 365 F. Supp. 792 (M.D. Pa. 1973).

[2] The legislative history of § 6659 precludes any interpretation of it that would provide a 90 day notice. The section "provides a general rule that the additions to tax for the late filing of income . . . tax returns . . . are to be assessed and collected without the issuance of a 90 day letter." S. Rep. No. 86-1098, 86th Cong., 2d Sess. (1960).

[3] Cases such as *Grandquist* v. *Hackleman*, 264 F.2d 9 (9th Cir. 1959) and *Strawberry Hills Press, Inc.* v. *Scanlon*, 273 F.2d 306 (2d Cir. 1959), were expressly mentioned in the Senate committee report and apparently were the impetus for the statutory revision. 1960 U.S. Code Cong. & Admin. News 2025-26.

they, together or singly, operate to deprive a taxpayer of an opportunity to contest, prior to payment, a penalty assertedly due to the government. However, 28 U.S.C. § 2282 provides that an injunction "restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution . . . shall not be granted . . . unless the application therefor is heard and determined by a district court of three judges . . ." We do not fault the district court for not initially recognizing that the complaint raised issues requiring three-judge resolution. Appellant did not ask for such a court, and while it raised in general terms its *Fuentes* due process claim, it did not apparently recognize that the government was bound by law to act as it has. It is not up to the courts to analyze a plaintiff's case and guide him into the correct courtroom. *Cf. Aaron* v. *Cooper*, 261 F.2d 97, 105 (8th Cir. 1958). However, it is now apparent that if appellant is to secure a determination of its constitutional claim, a three-judge court is required. Although Spencer did not seek to enjoin a specific section of the Code, its claim inevitably involved a request that an injunction issue directing an officer of the United States to ignore an Act of Congress on the grounds of its unconstitutionality. *Cf.* cases cited and discussed in Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 37-50 (1964).

In extraordinary circumstances we might have jurisdiction to continue our injunction in effect until organization of the three-judge court, *cf. Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1 (1971). While we are not included to do so here, we rely upon the government's good faith not to take further action to collect the additional tax until sufficient time has elapsed for plaintiff, acting with dispatch, to file an amended complaint, request a three-judge court,

and make a timely request to that court for such temporary or preliminary relief as the court may be able or willing to give. The case is remanded to the same district judge.

Since appellant must bear the heaviest responsibility for the time that has been wasted going in the wrong direction, we award costs of this appeal to the government.

Judgment vacated. Remanded to the district court with instructions to call for convening of a three-judge court should the plaintiff within ten days file an amended complaint requesting such a court and raising appropriately framed issues, the action otherwise to be dismissed with prejudice. Costs to appellee.

United States Court of Appeals for the First Circuit

No. 73-1399.

SPENCER PRESS, INC.,
PLAINTIFF, APPELLANT,
v.
DONALD ALEXANDER, ETC.,
DEFENDANT, APPELLEE.

JUDGMENT

Entered February 5, 1974

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court with instructions to call for convening of a three-judge court should the plaintiff within ten days file an amended complaint requesting such a court and raising appropriately framed issues, the action otherwise to be dismissed with prejudice. Costs to appellee.

By the Court:
DANA H. GALLUP
Clerk.

By /s/ Francis P. Scigliano
Chief Deputy Clerk.

[cc: Messrs. Smith and Ross.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NOS. 73-4068-C
73-4159-C

SPENCER PRESS, INC.,
PLAINTIFF
v.
DONALD ALEXANDER,
DEFENDANT

MEMORANDUM

February 28, 1977

CAFFREY, Ch. J.

This three-judge court has been convened on the motion of the plaintiff-taxpayer pursuant to 28 U.S.C. §§2282, 2284. Taxpayer seeks to have declared unconstitutional the statutory scheme which authorizes or directs seizure of property without affording the opportunity for a prior hearing. Taxpayer also seeks to enjoin defendant from assessing and collecting a penalty from it for its failure to file timely income tax returns for the years 1966 through 1970. The defendant Commissioner has moved to dismiss on the ground, *inter alia*, that the suit cannot be maintained since it is barred by the Anti-Injunction Statute, 26 U.S.C. §7421(a) which provides in pertinent part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . ."

Taxpayer failed to timely file its income tax returns for the years 1966 through 1970. When notified of its failure to do so, taxpayer investigated and found that it was the victim of misrepresentation and fraud by its own accountant, but for which it would have filed these tax returns. Taxpayer promptly filed all of these returns, paid the taxes reported thereon plus all interest owed and, claiming reasonable cause, requested waiver of penalties and assessments. The IRS denied taxpayer's request for a waiver of penalties and assessments and informed taxpayer of its intention to collect the "addition to tax" owed.

Taxpayer originally brought this action requesting a single judge of this district to determine on the merits that no penalty or assessment was owing. In the alternative, taxpayer requested the Court to order the Commissioner to issue a Notice of Deficiency so that it would have an opportunity to present the matter to the Tax Court prior to the collection of the "addition to tax." Relief was denied by the district court judge.

The plaintiff appealed and obtained an injunction preventing the collection of any "addition to tax" until the appeal had been determined. The Court of Appeals for the First Circuit upheld the district court on the issues on which he had ruled, but vacated the judgment and remanded the case to the District Court with instructions to call for the convening of a three-judge court if taxpayer amended its complaint to raise the constitutional issue. *Spencer Press, Inc. v. Alexander*, 491 F.2d 589 (1 Cir. 1974).

Plaintiff did file an amended complaint raising the "question of the constitutionality of §§6659, 6213, 6212, and 7421 to the extent that they, singly or together, operate to deprive a taxpayer of an opportunity to contest, prior to payment, a penalty assertedly due to the government." *Id.* at 591. A controversy still exists between the parties since the Commissioner has refrained from collecting the addi-

tional tax pending resolution of the constitutional issue but he has made it clear to the taxpayer that liens will be placed upon the taxpayer's property if resolution is in his favor.

Subsequent to the filing of plaintiff's amended complaint, the Supreme Court rendered a decision in the case about which the Court of Appeals indicated concern regarding the constitutionality of the legislative scheme complained about by Spencer Press. In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), the Supreme Court held that application of the Anti-Injunction Statute was not a denial of due process as long as the taxpayer had access to judicial review in a refund action. Taxpayer does have such access to judicial review, i.e. a suit for refund, after he pays the penalty and assessment.

Taxpayer seeks to distinguish his case from *Bob Jones* on three grounds:

First, taxpayer claims there is a basis for distinguishing the instant case from *Bob Jones* because here the constitutional challenge is being made in a three-judge court. We rule that the forum in which a constitutional challenge is made is purely a matter of jurisdiction which has nothing to do with the merits of that constitutional challenge.

The second and third distinctions urged by the taxpayer overlap but both stem from what it perceives to be a fundamental difference between a penalty or assessment on the one hand and a tax on the other. The conclusion taxpayer would draw from its attempted distinction is that it is constitutional to take away a charitable tax status without a prior hearing, as was done in *Bob Jones*, but it is not constitutional to impose a penalty or deficiency assessment without a prior hearing.

The distinction taxpayer seeks to draw is invalid. The Internal Revenue Code, 26 U.S.C. §§6601(f), 6659, expressly defines assessments and penalties as taxes. More-

over this Court is persuaded of the soundness of a recent decision of the Court of Appeals for the Fourth Circuit in a case on all fours with the instant case. That Court ruled that the allowance of injunctive relief to the taxpayer would totally frustrate the objectives of the Anti-Injunction Statute which are the furtherance of "efficient and expeditious collection of taxes with 'a minimum of preenforcement judicial interference,' and protection of the Collector from litigation pending a refund suit." *Professional Engineers, Inc. v. United States*, 527 F.2d 597, 599-600 (4 Cir. 1975), *quoting United States v. American Friends Service Committee*, 419 U.S. 7 (1974).

We conclude upon consideration of the record, memoranda and final argument that the instant case falls within the principles enunciated in *Bob Jones University* and *Professional Engineers, Inc., supra,* and that consequently this action is barred by the Anti-Injunction Statutes and should be dismissed.

Order accordingly.

/s/ Levin H. Campbell
Levin H. Campbell, Circuit Judge
/s/ Andrew A. Caffrey
Andrew A. Caffrey, District Judge
/s/ Walter Jay Skinner
Walter Jay Skinner, District Judge

Entered Feb. 28, 1977.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NOS. 73-4068-C
73-4159-C

SPENCER PRESS, INC.,
PLAINTIFF
v.
DONALD ALEXANDER,
DEFENDANT

ORDER

February 28, 1977

CAFFREY, Ch. J.

In accordance with Memorandum filed this date, it is

ORDERED:

Defendant's motion to dismiss is allowed.
Complaint dismissed.

/s/ Levin H. Campbell
Levin H. Campbell, Circuit Judge
/s/ Andrew A. Caffrey
Andrew A. Caffrey, District Judge
/s/ Walter Jay Skinner
Walter Jay Skinner, District Judge

Entered Feb. 28, 1977.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO: 73-4068-C
NO: 73-4159-C

SPENCER PRESS, INC.
PLAINTIFF
VS
DONALD ALEXANDER, COMMISSIONER
OF INTERNAL REVENUE FOR THE
UNITED STATES OF AMERICA,
DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Spencer Press, Inc., the plaintiff in the above civil action, hereby appeals to the Supreme Court of the United States from the final Order dismissing the complaint, entered in this action on February 28, 1977.

This Appeal is taken pursuant to 28 USC, s.1253.

SPENCER PRESS, INC.
By its Attorney,

Robert B. Smith
52 Commercial Wharf
Boston, Mass. 02110
723-9336

Filed April 27, 1977.

Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-1855

In the Supreme Court of the United States

OCTOBER TERM, 1977

SPENCER PRESS, INC., APPELLANT

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

WADE H. MCCREE, JR.,
Solicitor General,

M. CARR FERGUSON,
Assistant Attorney General,

CROMBIE J. D. GARRETT,
DAVID ENGLISH CARMACK,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1855

SPENCER PRESS, INC., APPELLANT

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee, the Commissioner of Internal Revenue, moves that the order of the district court be affirmed.

STATEMENT

This is a direct appeal under 28 U.S.C. 1253, from a final order of a three-judge district court dismissing appellant's complaint which sought to enjoin the Commissioner of Internal Revenue from collecting additions to tax assessed under Section 6651(a) of the Internal Revenue Code of 1954 (26 U.S.C.) for appellant's failure to file timely returns (J.S. 2; J.S. App. B, pp. 28-33).

The pertinent facts are as follows: Appellant failed to file income tax returns for 1966 through 1970. Upon notification by the Internal Revenue Service that no returns had been filed for those years, appellant filed the

delinquent returns and paid in full all of the tax and interest due.[1] Appellant requested the waiver of any penalties and additions to tax for the late filing of the returns on the ground that it relied on its accountant to prepare and file the returns. The Internal Revenue Service denied the request and assessed additions to tax of $29,636.98 under Section 6651(a)(1) of the Code for failure to file timely returns for 1969 and 1970, and informed appellant of its intention to collect the additions to tax owed (J.S. 4; J.S. App. B, pp. 23, 29).

Appellant thereupon commenced this action in the United States District Court for the District of Massachusetts to enjoin the Commissioner from collecting the additions to tax for late filing of the 1969 and 1970 tax returns. Appellant contended that the collection of the additions to tax prior to a judicial determination of the propriety of the assessment denied it due process of law in violation of the Fifth Amendment to the Constitution. Appellant further sought either a declaratory judgment that no additions to tax were owed or an order requiring the Commissioner to issue a deficiency notice so that the issue might be presented to the Tax Court prior to collection. The district court denied the relief requested and dismissed the complaint (J.S. 4; J.S. App. B, pp. 21-24).

The court of appeals agreed with the district court that the applicable statutes precluded a pre-levy judicial determination of appellant's liability for the additions to tax and that the complaint stated no ground upon which a single-judge district court could grant relief (J.S. App. B, pp. 22-23, 29). However, the court of appeals remanded the case to the district court "with instructions to call for convening of a three-judge [district] court should the plaintiff [appellant] within ten days file an amended

[1]There was no tax due for the years 1966 through 1968.

complaint requesting such a court and raising appropriately framed [constitutional] issues" (J.S. App. B, p. 27).

Appellant filed an amended complaint seeking the convening of a three-judge district court to determine the constitutionality of the issue raised in its original complaint and to enjoin the collection of the assessed additions to tax.[2] The Commissioner moved to dismiss the complaint on the ground that the suit was barred by 26 U.S.C. 7421(a), which prohibits any court from entertaining any suit for the purpose of restraining the assessment or collection of any taxes. The three-judge district court agreed with the Commissioner that the action was barred by 26 U.S.C. 7421(a). In the district court's view, this Court's decision in *Bob Jones University* v. *Simon*, 416 U.S. 725, reaffirmed that the statutory bar against injunctive actions in tax cases was not a denial of due process as long as the taxpayer could seek judicial review in a refund action, as appellant could in this case (J.S. App. B, pp. 29-31). The three-judge district court accordingly dismissed the complaint (J.S. App. B, p. 32).

ARGUMENT

The decision below is correct and there is no substantial question warranting plenary review by this Court.

1. Under the Internal Revenue Code of 1954, the only means by which a taxpayer can seek a judicial determination of the correctness of an assessment for an addition

[2]Section 2 of the Act of August 12, 1976, Pub. L. 94-381, 90 Stat. 1119, repealed 28 U.S.C. 2282, which provided for a three-judge district court in a case where the plaintiff sought "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States * * *." However, the repeal is inapplicable to actions commended on or before August 12, 1976.

to tax under Section 6651(a) for failure to file timely a return, is to pay the amount assessed and sue for a refund in the district court or the Court of Claims. See Sections 6201(a), 6211(a), 6212(a), 6213(a), 6659(a) and (b), 7421 (a) and 7422(a), Appendix, *infra*. Indeed, to overrule certain court decisions and reinstate what was believed to have been the law since 1926, Congress amended Section 6659(b), by the Act of May 14, 1960, 74 Stat. 132, to provide that additions to tax because of the late filing of the return shall be assessed without the issuance of a statutory notice of deficiency where there is no deficiency in tax as described in Section 6211.[3] See H.R. Rep. No. 1217, 86th Cong., 2d Sess. 1-4 (1960); S. Rep. No. 1098, 86th Cong., 2d Sess. 3-4 (1960); H.R. Cong. Rep. No. 1549, 86th Cong., 2d Sess. 2 (1960).[4]

---

[3]Here, there is no deficiency in tax as described in Section 6211. Accordingly, appellant cannot seek review in the Tax Court, the jurisdiction of which is limited to cases involving deficiences. See Section 6213.

[4]The report of the Committee on Ways and Means explained (H.R. Rep. No. 1217, *supra*, at 1-3):

> H.R. 9660 deals with the procedure for assessing certain additions to tax. Since 1926, additions to the tax shown on the return by reason of late filing of income tax returns have been assessed without the issuance of a statutory notice of deficiency (which notice, commonly known as a 90-day letter, gives the taxpayer 90 days in which to petition the Tax Court for a redetermination of a deficiency).
>
> This procedure was approved by the courts under the 1939 code. While the committee reports accompanying the 1954 code state that no change with respect to this procedure was intended, two courts of appeals have recently held that under present law a 90-day letter must be issued before assessment of an addition to tax for late filing.
>
> * * * * * *
>
> Your committee believes immediate enactment of clarifying legislation is vitally important to the orderly administration of

> the internal revenue laws in view of the court decisions. Otherwise, if the Service were forced into the position of having to issue 90-day letters in these cases, it would materially impede the collection of these additions to tax. Moreover, the procedure of assessing these additions without 90-day letters is one which generally has been accepted as an integral part of our tax system.
>
> * * * * *
>
> These court decisions [requiring the issuance of a 90-day letter before assessment of an addition to tax for late filing] have confronted the Internal Revenue Service with very serious administrative problems. For example, before a 90-day letter could be mailed with respect to the addition to tax for late filing, the Internal Revenue Service would have to examine the return to insure that there was no deficiency in tax which might be barred from later assessment because of the restrictions on the issuance of additional 90-day letters under section 6212(c) of the 1954 code. Such a procedure would force the Service to audit many thousands of returns which otherwise might not be audited. If the Service were forced to follow the 90-day letter procedure for additions to tax for late filing of returns and for underpayment of estimated tax, the number of 90-day letters issued each year would be increased to about 1 million; whereas the Service now issues only about 78,000 90-day letters each year for all causes.
>
> As a consequence, the Internal Revenue Service would either be forced to abandon most of its enforcement efforts in the area of late returns and underpayments of estimated tax or materially curtail the already limited number of returns audited in the course of a year. On the other hand, in practically all these cases there is no dispute either as to law or fact. Moreover, the Internal Revenue Service has for years apparently administered these provisions of the law in a practical, commonsense manner. Under such circumstances little purpose is served by invoking the elaborate 90-day letter procedure before assessing these additions to tax.
>
> Accordingly, your committee has provided in general, that, after the date of the enactment of the bill, the additions to tax for the late filing of income, estate, and gift tax returns and the underpayment of estimated income tax are to be assessed and collected without the issuance of a 90-day letter. This would restore the procedure followed by the Internal Revenue Service for many years.

Upon the Commissioner's assessment of the additions to tax against appellant, a statutory lien arose against appellant's property for the amounts assessed. Sections 6321 and 6322, Internal Revenue Code of 1954, Appendix, *infra*, pp. 4a-5a. In addition, the Internal Revenue Service has the power to levy upon a taxpayer's property to satisfy an unpaid assessment where the taxpayer refuses to pay the assessment within 10 days after notice and demand. Section 6331(a), Appendix, *infra*, pp. 5a-6a.[5]

Section 7421(a) of the Code (commonly known as the Anti-Injunction Act) bars suits to restrain or enjoin the assessment or collection of any tax. Pursuant to Section 6659(a)(2), statutory references to "tax" include additions to tax imposed for late filing under Section 6651(a). In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6-7; *Bob Jones University* v. *Simon*, 416 U.S. 725, 737; *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 758, this Court held the bar of Section 7421 to be absolute except upon a showing (1) that under no possible circumstances could the government prevail and (2) that the plaintiff would suffer irreparable injury for which there was no legal remedy. Appellant does not urge that its case falls within this narrow exception. Thus, the only issue presented on this appeal is whether the statutory requirement that a taxpayer can seek judicial review of the imposition of an addition to tax for late filing only after payment is consistent with due process under the Fifth Amendment.

Since *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 275-282, this Court has consistently held that summary seizure of property for collection of taxes does not violate the constitutional requirement

[5]Pending the disposition of this litigation, the Internal Revenue Service has voluntarily delayed the collection of the additions to tax at issue.

of due process as long as the taxpayer has an adequate opportunity for ultimate judicial determination of the liability. See, *e.g.*, *Springer* v. *United States*, 102 U.S. 586, 593-594; *Dodge* v. *Osborn*, 240 U.S. 118; 121-122; *Phillips* v. *Commissioner*, 283 U.S. 589, 595-597; *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92; *Commissioner* v. *Shapiro*, 424 U.S. 614, 630 n. 12. But see *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 611; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601. This Court has likewise upheld the summary collection of additions to taxes, civil penalties and interest that are imposed as civil sanctions for prompt payment of taxes. *Helvering* v. *Mitchell*, 303 U.S. 391, 402; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 338-339. Accord: *Professional Engineers, Inc.* v. *United States*, 527 F. 2d 597 (C.A. 4); *Harvey* v. *Early*, 160 F. 2d 836, 837 (C.A. 4); *Reams* v. *Vrooman-Fehn Printing Co.*, 140 F. 2d 237, 240-241 (C.A. 6); *McDowell* v. *Heiner*, 9 F. 2d 120, 122-123 (W.D. Pa.), affirmed *per curiam*, 15 F. 2d 1015 (C.A. 3), certiorari denied, 273 U.S. 759.

Indeed, the Court has described the refund suit procedure available to appellant as representing a complete system of corrective justice enacted pursuant to the government is right to prescribe the condition on which it would subject itself to the judgment of the courts in the collection of its revenues. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, *supra*, 18 How. at 276; *Nichols* v. *United States*, 7 Wall. 122, 126-127, 130-131; *Cheatham* v. *United States*, 92 U.S. 85, 88-89; *State Railroad Tax Cases*, 92 U.S. 575, 613-614; *Snyder* v. *Marks*, 109 U.S. 189, 193-194; *Oceanic Navigation Co.* v. *Stranahan*, *supra*, 214 U.S. at 339; *Phillips* v. *Commissioner*, *supra*, 283 U.S. at 595-597; *Enochs* v. *Williams*

Packing Co., supra, 370 U.S. at 7; *Bob Jones University* v. *Simon, supra,* 416 U.S. at 746-747; *Alexander* v. *"Americans United" Inc., supra,* 416 U.S. at 761-762; *United States* v. *American Friends Service Com.,* 419 U.S. 7, 12. "Delay in the judicial determination of property rights is not uncommon where it is essential that government needs be immediately satisfied." *Phillips* v. *Commissioner, supra,* 283 U.S. at 597. Appellant's constitutional challenge to the statutory requirement that it first pay the addition to tax and then sue for a refund is insubstantial.[6]

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.

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[6]*Lipke* v. *Lederer,* 259 U.S. 557, and the dictum in *Burke* v. *Mingori,* 128 F. 2d 996 (C.A. 10), upon which appellant relies (Br. 8), are inapposite. They are addressed to criminal penalties and not civil sanctions of the type involved here. Indeed, in *Helvering* v. *Mitchell, supra,* 303 U.S. at 402, the Court recognized that *Lipke* v. *Lederer* was not applicable where Congress had provided a civil sanction for the collection of taxes. See also *Bob Jones University* v. *Simon, supra,* 416 U.S. at 743. Moreover, in *Burke* v. *Mingori, supra,* 128 F. 2d at 997, the court stated that "the additions for failure to make return and for failure to pay the tax are civil incidents of the assessment and collection, not penalties in the nature of punishment. *Helvering* v. *Mitchell,* 303 U.S. 391, * * *."

DOJ-1977-09

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6201. ASSESSMENT AUTHORITY.

(a) *Authority of Secretary or Delegate.*—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) *Taxes shown on return.*—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) *Unpaid taxes payable by stamp.*—

(A) *Omitted stamps.*—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary or his delegate determines to be liable for such tax.

(B) *Check or money order not duly paid.*—In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) *Erroneous income tax prepayment credits.*—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(4) [as added by Sec. 809(d)(4)(A), Excise Tax Reduction Act of 1965, 79 Stat. 168 and amended by Sec. 207(d)(1), (2), Act of May 21, 1970, 84 Stat. 248] *Erroneous credit under section 39.*—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit allowable by section 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

* * * * *

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) [as amended by Sec. 101(f)(1), Tax Reform Act of 1969, 83 Stat. 524] *In General*—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

* * * * *

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, 72 Stat. 1665 and Sec. 101(j)(40), Tax Reform Act of 1969, *supra*] *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

* * * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, *supra*] *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien

in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322 [as amended by Sec. 113(a), Federal Tax Lien Act of 1966, 80 Stat. 1146] PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the

Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * *

SEC. 6651. FAILURE TO FILE TAX RETURN OR TO PAY TAX.

(a) [as amended by Sec. 943(a), Tax Reform Act of 1969, *supra*] *Addition to the Tax.*—In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure

is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 10 days of the date of the notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * * *

SEC. 6659. APPLICABLE RULES.

(a) *Additions Treated as Tax.*—Except as otherwise provided in this title—

(1) The additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the

additions to the tax, additional amounts, and penalties provided by this chapter.

(b) [as amended by Sec. 1, Act of May 14, 1960, 74 Stat. 132 and Sec. 101(j)(51), Tax Reform Act of 1969, *supra*] *Procedure for Assessing Certain Additions to Tax.*—For purposes of subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and chapter 42 taxes), subsection (a) shall not apply to any addition to tax under section 6651, 6654, or 6655; except that it shall apply—

(1) in the case of an addition described in section 6651, to that portion of such addition which is attributable to a deficiency in tax describe in section 6211; or

(2) to an addition described in section 6654 or 6655, if no return is filed for the taxable year.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, *supra*] *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged

to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

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